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No. 87-745

IN THE

Supreme Court of the United States

October Term, 1987

FORD MOTOR COMPANY, *et al.*,
Petitioners,

v.

TUNIS BROTHERS COMPANY, INC.,
RICHARD N. de la RIGAUDIERE,
and DAVID C. SMITH,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SUPPLEMENTAL BRIEF OF RESPONDENTS IN OPPOSITION

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SUPPLEMENTAL BRIEF OF RESPONDENTS IN OPPOSITION

After we filed our Respondents' Brief in Opposition to the Petition for Certiorari in this case, the relevant and significant opinion of the United States District Court for the Southern District of New York in *Minpeco, S.A. v. Conticommodity Services, Inc.* ("Minpeco") was reported on January 11, 1988 in 673 F. Supp. 684 (S.D.N.Y. November 17, 1987).

This was an action alleging, *inter alia,* an antitrust conspiracy violating Sections 1 and 2 of the Sherman Act on the part of defendant silver futures traders and their brokerage houses to manipulate upward the price of silver and silver futures. Two defendant traders and three defendant brokers[1] moved for summary judgment on the ground that plaintiffs' evidence was "at least as consistent with legitimate, independent action as with participation in a conspiracy" (673 F. Supp. at 687). District Judge Lasker denied the motions for summary judgment stating in part (673 F. Supp. at 686):

> Although these well-briefed and argued motions present difficult and close questions, I conclude that the record contains sufficient evidence from which a reasonable jury could find that these five defendants participated in a conspiracy to manipulate silver prices. The jury, aided by the live testimony of witnesses subject to cross-examination, must decide whether the moving defendants[2] participated in the conspiracy alleged. Accordingly, the motions for summary judgment are denied.

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1. Merrill Lynch, Pierce, Fenner & Smith, Inc.; Prudential-Bache Securities, Inc.; and ACLI International Commodity Services, Inc. All footnotes in this Supplemental Brief have been added by respondents. They are not part of the *Minpeco* opinion.

2. The moving defendants were represented by Sullivan & Cromwell; Rogers & Wells; Debevoise & Plimpton; Curtis, Mallet-Prevost, Colt & Mosle; and Kaye, Scholer, Fierman, Hays & Handler.

Before discussing and evaluating the facts relating to each of the moving defendants and their respective arguments, Judge Lasker set forth the standards to be applied in considering motions for summary judgment as follows (673 F. Supp. at 687-9):

> Three recent Supreme Court decisions — *Matsushita Electric Industrial Co. v. Zenith Radio Corporation*, 475 U.S. 574, 106 S.Ct. 1348, 89 L. Ed. 2d 538 (1986), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986), and *Celotex Corporation v. Catrett*, 477 U. S. 317, 106 S. Ct. 2548, 91 L. Ed. 265 (1986) — and a recent opinion of the Court of Appeals for this circuit, *Apex Oil Co. v. DiMauro*, 822 F. 2d 246 (2d Cir. 1987), articulate the standards to be applied in motions for summary judgment under Fed. R. Civ. P. 56.
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> The Supreme Court has stressed that to establish a "genuine issue for trial" on a motion for summary judgment, the non-moving party must show more than "some metaphysical doubt as to the material facts," *Matsushita*, 106 S. Ct. at 1356. The *Matsushita* court made clear that "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party there is no 'genuine issue for trial.' " *Accord, Anderson*, 106 S. Ct. at 2511 (threshold inquiry is whether "there are any genuine issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party").[3]

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3. This Court emphasized in *Anderson* (106 S. Ct. at 2511) that "Our prior decisions may not have uniformly recited the same language in describing genuine factual issues under Rule 56, but it is clear enough from our recent cases that at the summary judgment stage the judge's function is *not himself to weigh the evidence and determine the truth of the matter* but to determine

However, while *Matsushita* and *Anderson* stand for the proposition that the trial court must carefully scrutinize the record to determine whether genuine issues for trial exist, the Supreme Court has also reaffirmed [in *Anderson*] that:

> Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are *jury* functions, *not* those of a *judge*, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor. *Neither do we suggest that the trial courts should act other than with caution in granting summary judgment* or that the trial court may not deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial. (Emphasis added).[4]

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whether there is a genuine issue for trial. . . . There is no requirement that the trial judge make findings of fact. The inquiry performed is the threshold inquiry of determining *whether there is the need for a trial* — whether, in other words, there are any *genuine factual issues* that properly can be resolved only by a finder of fact *because they may reasonably be resolved in favor of either party*." Noting that "the 'genuine issue' summary judgment standard is 'very close' to the 'reasonable jury' directed verdict standard," this Court also stated in *Anderson* (106 S. Ct. at 2512): "In essence . . . the inquiry under each is the same: whether the evidence presents a *sufficient disagreement* to require submission to a jury or whether it is *so one-sided* that one party must prevail as a matter of law." (Emphasis added.)

4. This Court further emphasized in *Anderson* (106 S. Ct. at 2513) that "Our holding that the . . . [applicable] standard of proof should be taken into account in ruling on summary judgment motions *does not denigrate the role of the jury*. It by no means authorizes trial on affidavits." In concluding its discussion of the non-moving plaintiff's burden under Rule 56, this Court stated once again in *Anderson* (106 S. Ct. at 2514-15): "We repeat, however, that the plaintiff, to survive the defendant's motion, need

Anderson, 106 S. Ct. at 2513-14 (citations omitted); *accord*, *Apex*, 822 F. 2d at 253 ("question of what weight should be assigned to competing permissible inferences remains within the province of the fact-finder at trial").[5]

To establish that the moving defendants participated in the antitrust conspiracy alleged, Minpeco must present direct or circumstantial evidence that reasonably tends to prove that the defendants had a conscious commitment to a common scheme to achieve an unlawful objective. *See Monsanto Co. v. Spray-Rite Service Corp.*, 465 U. S. 752, 764, 104 S. Ct. 1464, 1470, 79 L. Ed. 2d 775 (1984); *Apex*, 822 F. 2d at 252. In determining whether a plaintiff has produced sufficient evidence to prove such a commitment, *Matsushita* and *Apex* clarify that "antitrust law limits the range of permissible inferences from ambiguous evidence in a §1 [Sherman Act] case." *Matsushita*, 106 S. Ct. at 1357; *accord*, *Apex*, 822 F. 2d at 252.

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only present evidence from which a jury *might* return a verdict in his favor. If he does so, there is a genuine issue of fact that requires a trial." (Emphasis added.)

5. More fully, the Second Circuit noted in *Apex Oil Co. v. DiMauro*, 822 F. 2d 246, at 252-3 (2d Cir. 1987) that "while summary judgment is a valuable means for avoiding unnecessary trials, and recent Supreme Court as well as Second Circuit cases have tended to encourage its use in complex cases such as this one, . . . it should not be regarded as a substitute for trial. Thus, while the Supreme Court has indicated that trial courts should draw only reasonable inferences in favor of the non-moving party viewing the evidence as a whole, . . . and while some assessing of the evidence is necessary in order to determine rationally what inferences are reasonable and therefore permissible, it is evident that the question of *what weight should be assigned to competing permissible inferences* remains within the province of the fact-finder at a trial." (Emphasis added.) This Court denied certiorari in *Apex* (No. 87-633) on December 7, 1987 (56 United States Law Week 3400).

> First, "conduct as consistent with permissible conduct as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Matsushita*, 106 S. Ct. at 1357; *accord, Apex*, 822 F. 2d at 252. There must be evidence in the record that "tends to exclude" the possibility that the alleged conspirators were acting independently, rendering the inference of conspiracy reasonable in light of the competing inferences of independent action. *Matsushita*, 106 S. Ct. at 1357; *Apex*, 822 F. 2d at 252. * * * Second, the economic plausibility of the plaintiff's claims is relevant to a determination whether genuine issues exist for trial: if the claim is one that "simply makes no economic sense," the plaintiff must come forward with more persuasive evidence to support its claim than would otherwise be necessary. *Matsushita*, 106 S. Ct. at 1356. Furthermore, in the antitrust context: "[l]ack of motive bears on the range of permissible conclusions that might be drawn from ambiguous evidence: if [defendants] had no rational economic motive to conspire, and if their conduct is consistent with other, equally plausible explanations, the conduct does not give rise to an inference of conspiracy." *Id.* at 1361.

Applying the foregoing principles to the facts in *Minpeco*, Judge Lasker denied the summary judgment motions of all moving defendants, noting that "This case — like *Apex* — turns on the competing inferences that may reasonably be drawn from largely undisputed facts. Once it is concluded that the record supports a reasonable inference that each moving defendant participated in the alleged conspiracy, it is for the jury to choose between Minpeco's version of events and that of the defendants." (673 F. Supp. at 689).

The competing inferences in this *Tunis Brothers* case are even more for a jury to resolve than in *Minpeco* where there were "largely *undisputed* facts". Not only

did the defendants deny all material allegations of plaintiffs (A-15), but the Third Circuit noted that "there are numerous factual questions unresolved in this case" (A-32) and that "disputed issues of material fact as to motive, intent and conflict of interest permeate this record" (A-49).

The *Minpeco* opinion is helpful in restating the summary judgment standards of *Matsushita* and *Anderson* and in stressing *Anderson's* emphasis of the respective functions of judge and jury on summary judgment motions. *Minpeco* is also helpful in its careful analysis of the facts presented in that antitrust case in light of those standards and judge-jury functions, and in its application of the principles thus stated by this Court.

1. In examining the motives and sometimes conflicting or competing motivations of the various defendants, the court concluded that this was *not* a case in which plaintiff Minpeco's conspiracy claim as to a defendant "simply makes no economic sense" (673 F. Supp. at 692), or where "there was no rational economic motive to conspire" (*Id.* at 694), or where a defendant's "alleged participation in the conspiracy is wholly implausible" (*Id.* at 695). As to another defendant, the *Minpeco* court found that "a jury could reasonably infer" that, "despite his sworn denial to the contrary, [he] had participated in the conspiracy" (*Id.* at 697). Although the explanation of another defendant was "plausible, it is subject to a conflicting, reasonable interpretation that his participation in the conspiracy explains [his] seemingly inconsistent conduct" (*Id.* at 698).

Since the factual context in *Minpeco* did not make the plaintiff's claim "implausible", since that conspiracy claim was not one that "simply makes no economic sense" (as was the case in *Matsushita*), the *Minpeco* court did *not* find it necessary or proper to apply the *Matsushita* requirement that plaintiffs "must come forward with *more persuasive evidence* to support their

claim than would otherwise be necessary" (*Matsushita*, 106 S. Ct. at 1356) (Emphasis added.)

It should be noted that *Matsushita* speaks only of "more *persuasive*", not "more *plausible*" evidence. Petitioners misread *Matsushita* when they state in their Reply Brief (p. 4) that *Matsushita* "mandates that to avoid summary judgment a plaintiff must present evidence that conspiracy is more *plausible* than independent action", and when they state in their Petition (p. 11) that "Plaintiff must show that conspiracy is more *plausible* than independent action." Unlike the factual situation in *Matsushita* where this Court found that defendants had no plausible motive to conspire and plaintiffs' claim made no economic sense, the Third Circuit concluded in this *Tunis Brothers* case that plaintiffs present a "plausible" view of the facts (A-32). The motivation of defendants Ford Motor Company and Wenner Ford Tractor, Inc. to conspire to eliminate plaintiffs from competition with Wenner Ford in the Kennett Square area made economic sense from defendants' viewpoint.

2. In concluding that the evidence adduced by plaintiffs in this case to satisfy their summary judgment burden "meets *Matsushita's* requirements", the Third Circuit stated that this evidence is "substantial but not overwhelming" (A-4). Similarly, in *Minpeco* the court concluded that, although plaintiff's conspiracy evidence as to one defendant was "not in itself overwhelming, . . . when considered together with [other] evidence . . . it is sufficient to permit a reasonable juror to conclude that [this defendant] participated in the conspiracy" (673 F. Supp. at 699).

Notwithstanding the repeated efforts of defendant petitioners to belittle plaintiffs' evidence, the Third Circuit found that "the evidence can be interpreted as disclosing a vertical conspiracy between Ford and the Wenner Ford dealership to eliminate Tunis as a Wenner

Ford competitor" (A-4), that plaintiffs' evidence is "substantial" (A-4), and that "Instead of simply terminating the Tunis dealership in a straightforward manner in order to streamline its dealership structure, there is *substantial evidence* from which it can be inferred that Ford, acting with Wenner Ford Tractor, Inc., engaged in trickery and chicanery in order to eliminate Tunis as a competitor of Wenner Ford. The evidence shows that Ford had a substantial financial interest in Wenner Ford. It also shows that two Ford employees, [defendants] Fraher and Hasel, served as directors and officers of Wenner Ford. In addition, there is evidence from which one may conclude that Ford employees tricked Tunis into resigning and caused de la Rigaudiere's and Smith's application for the Kennett Square Ford tractor dealership to be rejected due to false financial information that Fraher had inserted into their dealership application. When we consider, as we must, the record as a whole, [plaintiffs'] evidence tends to exclude the possibility that Ford acted independently, and it shows that an inference of illegal conspiracy between Ford and Wenner Ford is reasonable" (A-4 to A-5).

After reviewing "with painstaking care . . . this massive 3,172 page record", the Third Circuit stated, *inter alia*, in the course of its long factual summary in *Tunis Brothers I*, that "The plaintiffs make a compelling argument that Wenner Ford conspired with Ford through defendants Fraher and Hasel" (A-41); that "the evidence presented supports an inference that the close ties between defendants Hasel and Fraher and defendants Ford and Wenner Ford led to an illegal agreement, even if implicit" (A-42); that the trial judge failed to factor into the overall conspiracy equation "certain significant evidence that clearly favored the plaintiffs" (A-19); and that "plaintiffs have submitted evidence which could lead a jury to believe that the decision to terminate was not made *unilaterally* on the part of Ford" (A-37).

3. In *Minpeco* the defendants each contended that their respective activities were independent and non-conspiratorial in nature. The *Minpeco* court found that there were competing inferences of a conspiracy that should be submitted to a jury.

Ford claims that its termination of the Tunis Brothers franchise in Kennett Square and its rejection of plaintiffs' application for a new franchise there were unilateral decisions on the part of Ford and consistent with its long-standing marketing plan and strategy for the elimination of a dealership in Kennett Square. The Third Circuit was skeptical of this, stating (A-43 to A-44): "From our reading of the record, however, this articulated business justification raises disputed issues of fact. Furthermore, we cannot reconcile this 'plausible explanation' with the conduct of the defendants that fell short of 'proper business practices.' . . . Are we to assume that the allegedly falsified credit applications of de la Rigaudiere and Smith and the allegedly fraudulent inducement of Mr. Tunis to submit an unconditional resignation is conduct consistent with the implementation of a legitimate business purpose?" Though the franchise agreement between Ford and Tunis Brothers gave Ford the right to terminate the franchise at will (Pet. 4), Ford's alleged market plan was to terminate it "as soon as Mr. Tunis retired or resigned" (A-43; A-26). This explains Ford's "trickery and chicanery" (A-5) in precipitating the "retirement" of Mr. Tunis.

4. Plaintiffs produced both *direct* and *circumstantial* evidence. Our *direct* evidence, which the Third Circuit noted (A-17 and A-41) and which its opinions and the record reflect throughout, should be considered when determining the applicability of *Matsushita*. However, upon remand the Third Circuit has clearly and correctly set forth (A-1 to A-5) the summary judgment principles enunciated in *Matsushita* and summarized in *Minpeco*, and then applied them correctly in this case in

the light of all the evidence and the competing inferences presented. The Third Circuit has carefully and faithfully followed and applied *Matsushita*.

5. The Third Circuit has also been very mindful in this case of the respective functions of judge and jury on summary judgment motions as emphasized in *Anderson* and noted in *Minpeco*. See pp. 2-4 *supra*. The Third Circuit properly reversed the summary judgment in favor of defendants. A trial by jury, not a summary judgment, is what the facts and law require here. As Judge Higginbotham stated in *Tunis Brothers II* (A-5): "When we consider, as we must, the record as a whole, [plaintiffs'] evidence *tends to exclude the possibility that Ford acted independently*, and it shows that an inference of illegal conspiracy between Ford and Wenner Ford is reasonable. This is, in other words, a case where the 'antitrust plaintiffs raise genuine issues of fact as to the existence of a common scheme or commitment, and the unlikelihood of independent action on the part of the defendants. The issue of whether the defendants unlawfully conspired [therefore] belongs with the jury.' "

CONCLUSION

For the reasons stated above and in our Respondents' Brief in Opposition, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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